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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 300

SOUTHWESTERN BELL TELEPHONE COMPANY,
Appellant,

vs.

S. B. HANNA,
Appellee.

STATEMENT IN SUPPORT OF THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

Preliminary Statement.

With the object of a better understanding of this case, the appellant believes the recitation of a bit of historical matter in explanation of the record, although to some extent antedating it, may be helpful.

Several years ago, the appellant, in the conduct of its telephone utility business in Arkansas, commenced a campaign to enforce its Rule V-c, as it is generally known in the record. This rule reads:

> "USE OF CUSTOMER SERVICE—Customer telephone service, as distinguished from public and semi-public telephone service, is furnished only for use by the customer, his family, employees or business associates, or

persons residing in the customer's household, except as the use of the service may be extended to joint users. The Telephone Company has the right to refuse to install customer service or to permit such a service to remain on premises of a public or semi-public character when the instrument is so located that the public in general or patrons of the customer may make use of the service. At such locations, however, customer service may be installed, provided the instrument is so located that it is not accessible for public use" (R. 61).

As a result of this campaign of enforcement, the City of Fort Smith enacted an ordinance which had the effect of setting aside the rule. This ordinance was validly enacted under the Arkansas Utilities Act establishing a dual form of utility regulation—a delegation of authority to regulate utilities, both to the cities, and to the State Commission, there called the Department of Public Utilities, with revisory control over city ordinances by the Department on what is commonly known as appeal.

The ordinance of the City of Fort Smith was appealed to the Department by the appellant here, and the Department found, after a considerable hearing, that the ordinance was unreasonable, and that the appellant's rule was reasonable, and the Department ordered the vigorous enforcement of the rule throughout the State. (Its opinion and order are in the record here.) The validity of this order was affirmed, on appeal, by the Supreme Court of Arkansas. (*City of Fort Smith* v. *Department of Public Utilities*, 195 Ark. 513, 113 S. W. 2d 100.) In order to avoid the penalties of the Utilities Act, appellant had no alternative save to enforce the rule, whereupon appellant was held liable for statutory penalties, under Section 14261, *infra*, on account of said enforcement.

The rule, by its clear terms, restricts the use of customer service, under customer rates, to the customer, his family,

his employees, and his business associates. If service is wanted for others as well, the classification of service is no longer the customer classification, but is the semi-public classification, to which different rates apply as indicated in the appellant's filed tariffs which are in the record here.

This case originated in a written demand by the plaintiff below that, in substance, the appellant provide him with service of the semi-public classification, (to which the rule would not apply), at the rate for service of the customer classification, (to which the rule would apply). The appellant refused to comply with this written demand because to do so would be to violate the Arkansas Utilities Act requiring that the filed rates must not be departed from (Pope's Digest, Sec. 2075.)

Thereupon the plaintiff below instituted this action for the recovery of penalties provided by the laws of Arkansas (Pope's Digest, Sec. 14261), reading:

> "Discrimination—Penalty. Every telephone company doing business in this State and engaged in a general telephone business shall supply all applicants for telephone connection and facilities without discrimination or partiality, within ten days after written demand therefor; provided, such applicants comply with the reasonable regulations of the company, and no such company shall impose any condition or restriction upon any such applicant that is not imposed impartially upon all persons or companies in like situations; nor shall such company discriminate against any individual or company engaged in lawful business, by requiring as condition for furnishing such facilities that they shall not be used in the business of the applicant, or otherwise, under a penalty of one hundred dollars, and five dollars per day for each day from the expiration of said notice until said demand is complied with or suit is instituted for penalty for failure to comply with said demand, for such discrimination, after compliance or offer to comply with the reasonable regulations of such

> company and the time to furnish the same has elapsed, to be recovered by the applicant whose application is so neglected or refused. And any person denied such telephone facilities shall also have the right to proceed by mandamus or other proper remedy to enforce the furnishing of same and the court shall hear such applications either in vacation or in term time and make such temporary orders relative to the furnishing of such facilities as the facts may justify, and may enforce compliance therewith, until such orders are vacated by order of the Court or the judge at chambers, or such suit is finally determined."

The plaintiff's claim at the trial of the cause was, not that the rule was unreasonable, but that other customers were violating the appellant's rule, or were receiving service of the semi-public classification at the lower rate for the customer classification, and that the refusal of the appellant to violate the Utilities Act in his case, by providing semi-public service at the customer rate, subjected the appellant to the penalties of Section 14261.

The Supreme Court of Arkansas affirmed plaintiff's judgment by declaring the rule unreasonable in a collateral proceeding, although the same rule had been earlier declared reasonable by the regulatory tribunal.

Statutory Provision Sustaining Jurisdiction of the Supreme Court of the United States.

This Court has jurisdiction of this cause under Judicial Code, Section 237 as amended (28 U. S. C. A. 344), which provides:

> "(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution,

treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion award execution or remand the cause to the court from which it was removed by the writ.

(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph. (R. S. Sections 690, 709; Mar. 3, 1911, c. 231, Sections 236, 237, 36 Stat. 1156; Dec. 23, 1914, c. 2, 38 Stat. 790; Sept. 6, 1916, c. 448, Sec. 2, 39 Stat. 726; Feb. 17, 1922, c. 54, 42 Stat. 366; Feb. 13, 1925, c. 229, Sections 1, 43 Stat. 937.)

28 U. S. C. A. Sections 344 (a) and 344 (b) and under 28 U. S. C. A., Sections 861 (a) and 861 (b):

"(a) The writ of error in cases, civil or criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal (Jan. 31, 1928, c. 14, Sec. 1, 45 Stat. 54).

(b) The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas and mandate, shall be applicable to the appeal which section 861 (a) of this title substitutes for a writ of error. (Jan. 31, 1928, c. 14, Sec. 2, 45 Stat. 54, as amended April 26, 1928, c. 440, 45 Stat. 466.)"

Statute of Arkansas, Validity of Which is Involved.

The validity of the Statute of Arkansas (Pope's Digest, sec. 14261, as interpreted in the decision of the Arkansas court in this cause, see *Ward v. Krinsky*, (1922) 259 U. S. 503, 42 S. Ct. 529, 66 L. Ed. 1033) is here involved. The statute has heretofore been quoted herein, verbatim.

There is furthermore involved herein the action of the Supreme Court of Arkansas in adjudging the appellant's aforesaid rule to be unreasonable, when it did so in a collateral action—without any statutory delegation of authority to perform this legislative function—and did so without any evidence to support its finding that the rule was unreasonable.

The only statute of Arkansas that could conceivably authorize the court so to act legislatively is the selfsame penalty statute, sec. 14261, and if it could be so construed, the validity of that statute is again challenged for its constitutional imperfections.

The appearances are that the Supreme Court of Arkansas acted legislatively in this case, in complete disregard of the statutes, and without any statutory authority to act

legislatively, whereas if it had had statutory authority to act as it did in this case, the validity of the statute under which it might have so acted would have also been here challenged and involved.

Date of Judgment and Application for Appeal.

The judgment sought to be reviewed was entered in the lower court on May 8, 1939, by the Supreme Court of Arkansas, the highest court of the State, on April 8, 1940, and appellant's petition for rehearing in the Supreme Court of Arkansas was denied June 3, 1940. Application for appeal to the Supreme Court of the United States was presented and granted June 27, 1940.

Stage at Which the Federal Questions Were Raised.

The Federal questions (all involved the Federal constitution) were first raised on petition for rehearing, in the Supreme Court of Arkansas, except as the appellant in its briefs before said court undertook to demonstrate the unconstitutional consequences of such a decision as the court reached. These considerations were offered, however, not so much to raise questions of constitutionality, as to influence an interpretation of the penalty statute which would permit it to conform with the constitution. The appellant, under statutory injunction, particularly in view of the order of the regulatory body, was obliged to enforce its rule, and it could not have anticipated a decision that its rule would be declared unreasonable, and that it could be declared so in a collateral proceeding for the first time by an appellate court, without evidence, and without notice and hearing, and without any issue being tendered in the trial court. The constitutional questions were raised in the petition for rehearing, in substantially the same language as contained in the accompanying assignment of errors. Appellant had no earlier opportunity to raise the Federal questions.

The Supreme Court of Arkansas disposed of the Federal questions so raised in the petition for rehearing by denying the petition without comment by *per curiam* opinion dated June 3, 1940.

The Federal Questions Are Substantial.

All of the Federal questions here raised have to do with the invasions of the appellant's rights vouchsafed by the 14th Amendment to the Constitution of the United States; and as such all these questions are substantial.

The Substantial Federal Questions Involved.

1. The court so construed the penalty statute under the circumstances of this case, as to deprive appellant of its property.

At no time in the trial of the case in the circuit court, nor in the briefs presenting the case to the Supreme Court of Arkansas, was the reasonableness of the appellant's rule V-c questioned, even if we indulge the rash assumption that it could be questioned in a collateral proceeding. Not until the decision of the Supreme Court of Arkansas did appellant apprehend that there was, or could be, any contention that the rule was unreasonable, or that by any chance such an interpretation could be put upon it in this case.

Under these circumstances, the assessment of penalties, although the appellant in good faith sought to enforce said rule in obedience to the order of the Department of Public Utilities, amounts to a construction of the penalty statute, Section 14261, so as to take appellant's property without due process of law and deny to it the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States. In an analogous case, almost a dead parallel, where the predecessor of this appellant was enforcing a rule which it had every reason to believe was

reasonable, this Court reversed the judgment of the Supreme Court of Arkansas, which had held the rule unreasonable and had allowed penalties against appellant, for the reason that the penalty statute, Section 14261, was so construed as to deprive appellant of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States. *Southwestern Tel. & Tel. Co.* v. *Danaher*, 238 U. S. 482, 35 S. Ct. 886, 59 L. Ed. 1419.

2. The court in its pretended exercise of legislative authority acted so as to deny due process to appellant.

The action of the Arkansas court in declaring the appellant's rule unreasonable deprived the appellant, in a strange way, of due process of law in the fixing of a rate for utility service.

The regulation of the rates of public utilities is a legislative process. The upsetting of the appellant's rule defining the amount of service to be provided for the established rate necessarily constitutes a rate order. Every rule affecting a rate is a part of the rate—and so specifically says the statute of Arkansas in its definition of "rate" (Sec. 2064, Pope's Digest).

The legislative regulatory power in this day is customarily delegated to administrative commissions with provision for judicial review of the lawfulness of their orders by direct proceedings in the courts. This is the procedure established by the Arkansas Utilities Act (Act 324, Laws of 1935). The legislative power is delegated to the Department of Public Utilities, and the courts are invested with jurisdiction in a direct proceeding to determine whether the Department "has regularly pursued its authority". The statute (clearly enough, it would seem) does not delegate any legislative authority to the courts, but confines their jurisdiction to a simple yea or nay answer to the question

of the Department's order having been reached in accordance with its statutory authority.

The jurisdiction of the Department legislatively to determine the reasonableness of the appellant's rule was involved some two years before the case at bar was brought, and, after hearing, the Department confirmed its reasonableness and ordered the rule enforced. Upon appeal, eventually reaching the Supreme Court of Arkansas, that court sustained the order of the Department as validly made in its legislative capacity (*Fort Smith* case, *supra*). The court in that case was, however, not concerned with the reasonableness of the rule since it had not been claimed that the department exceeded its statutory authority to prescribe only reasonable rules.

Under the circumstances, in the case at bar, the action of the Supreme Court of Arkansas in adjudging the appellant's rule to be unreasonable effects a deprivation of appellant's property without due process of law contrary to the 14th Amendment in two ways:

(a) The court essays a legislative act, without any delegated authority so to act, and employs its judicial power of execution of its judgments to enforce its spurious legislative order. This procedure so offends the traditionally accepted concepts of the orderly processes of law as to constitute a taking without due process. Due process of law, in its simplest meaning, cannot embrace the unexpected promulgation of a legislative order by a judicial tribunal without delegated legislative authority, followed by the judicial execution of the legislative order against the property of the appellant.

(b) If it be assumed that the Supreme Court of Arkansas, by some non-existent statute, possesses legislative power to regulate utility rates, then the exercise of that power by the court in this case denies the appellant due process of law.

The appellant was afforded no notice of attack, even the forbidden collateral attack (*Texas, etc., R. Co.* v. *Abilene Cotton Oil Co.*, 240 U. S. 426, 51 L. Ed. 553), on the reasonableness of its rule, nor any hearing thereon. The Arkansas court in its own opinion (140 S. W. 2d 132, 134) conceded that the issue of reasonableness had not been tendered at the trial. And consequently, of course, no evidence of the reasonableness of the rule was ever offered. The Supreme Court of Arkansas, accordingly, annulled the appellant's rule, which had been held reasonable and ordered enforced by the valid order of the regulatory Department, without evidence, without notice, and without hearing. This action amounts to a clear contravention of the 14th Amendment under the authority of:

Chicago, etc., R. Co. v. *Minnesota*, 134 U. S. 418, 33 L. Ed. 970;

San Diego Land Co. v. *National City*, 174 U. S. 739, 43 L. Ed. 1154 (Ohio Case—Cardozo opinion);

West Ohio Gas Co. v. *Comm.*, 294 U. S. 63, 79 L. Ed. 761;

Ohio Bell Tele. Co. v. *Commission*, 301 U. S. 292, 81 L. Ed. 1093.

Without such opportunity for hearing, the appellant was unable to present its potential claims that the ultimate declaration of the unreasonableness of the rule would effect a taking of its property without due process of law by requiring the provision of free service to the non-customer classification:

Northern Pac. R. Co. v. *North Dakota*, 236 U. S. 585, 59 L. Ed. 735;

and by requiring the appellant to forsake its constitutional property right to establish itself reasonable classifications of service, and reasonable rates applicable thereto:

Chicago, etc., R. Co. v. *Wisconsin*, 238 U. S. 491, 59 L. Ed. 1423.

3. The court's decision effects a taking of appellant's property without due process in any event.

In the contingency that it might sometime be contended that this case might be construed as having been decided on a non-Federal ground, namely, on the ground of a discriminatory application of a reasonable rule, the appellant considers it essential to emphasize that such could not possibly be the case. Except as the rule is declared unreasonable, the case would be governed by the decision of the Arkansas court in *Southwestern Tel. & Tel. Co.* v. *Sharp & White*, 118 Ark. 541, 177 S. W. 25, which is nowhere overruled in the opinion here, but which is indeed cited in this very opinion with approval.

In addition, if the decision of the Arkansas court should be considered from the assumption that the rule was declared reasonable, rather than unreasonable, the decision holding appellant liable for penalties, when appellant was enforcing a tariff rule which it had been ordered to enforce by the Arkansas Department of Public Utilities, placed appellant in the anomalous and inequitable position where, if it complies with the order of the Department of Public Utilities, it becomes liable for the statutory penalty under Section 14261 of Pope's Digest, whereas, if it ignores the order of the Department of Public Utilities, in order to avoid penalties under Section 14261, it then becomes liable for penalties fixed by Sections 61 to 64 of the Public Utilities Act of Arkansas (Pope's Digest, Sections 2121 to 2124) for violation of the orders of said Department. Appellant is thus placed in a situation where it is liable for penalties whichever course it takes, with no way of escape. Under this decision, the compliance with one statute would produce the violation of another, with resulting penalties. Even if (contrary to the record), appellant had violated the Utilities Act in deliberately permitting some customers to re-

ceive service at less than tariff rates, appellant would not, in the opinion and decision herein, be permitted to mend its ways and to comply with said Act thenceforth, but would be forced to continue to violate the Act in order to avoid penalties under Section 14261, *supra*. Thus appellant would be denied the equal protection of the laws and its property would be taken without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, in being compelled to multiply its criminal offenses under the Utilities Act.

The effect of the opinion and decision is to penalize appellant for enforcing an order of the State regulatory commission at the first place that it encounters a violation, on the ground that enforcement of the order might have been started elsewhere. Appellant is under the duty and has the right to comply with the said order wherever it finds violations thereof, without liability for penalties under Section 14261, *supra*, and to force appellant to violate its duty and take away appellant's right deprives appellant of its property without due process of law and denies it the equal protection of the law.

The appellant is held liable for penalties in the face of the conceded fact that appellee was offered the service desired at the only lawful rate, i. e., the filed tariff rate, but refused such a service. The opinion and decision thus holds that appellee, in order to recover penalties, does not have to comply with the reasonable rules and regulations of appellant, in spite of the fact that Section 14261, the penalty statute, makes such requirement of appellee before penalties can be recovered. Reading out of and nullifying the provision requiring compliance or offer to comply with the reasonable rules and regulations of the telephone company, interprets and construes the penalty statute, sec. 14261, *supra*, so as to make it unreasonable, arbitrary and oppressive and causes

it to operate to deprive appellant of its property without due process of law and to deny it the equal protection of the law.

Penalties were assessed against appellant because the court found that other customers of appellant were violating their contracts with appellant and thereby violating the tariff rule which appellant sought to enforce against appellee. The rule, as are all tariff rules of appellant, is a part of appellant's contracts with its subscribers. There was no evidence that appellant knew of such violations by any customer until they so testified from the witness stand, but all the evidence pointed to the fact that appellant was vigorously and energetically enforcing the rule wherever violations came to its attention. In view of the fact that these violations occurring on the customer's premises were unknown to appellant, and since appellant was entitled to rely upon its customers to perform their contracts with appellant, for the court to hold appellant liable for penalties for discrimination for not permitting appellee to so violate the tariff rule is to interpret the penalty statute, section 14261, *supra*, so as to deprive appellant of its property without due process of law and deny it the equal protection of the law. Under this interpretation of the penalty statute it is impossible for appellant to avoid penalties by reason of the derelictions of its customers except by forsaking its right to establish reasonable classifications, reasonable rules and regulations, and reasonable rates. The imposition of either alternative deprives appellant of its property without due process of law.

Of necessity, under the foregoing circumstances, appellant raised the Federal questions in its petition for rehearing to the Supreme Court of the State of Arkansas, since no Federal questions appeared in the case until decision of that court. The Federal questions were disposed of by

the *per curiam* opinion of June 3, 1940, denying the petition for rehearing.

The opinion of the Supreme Court of Arkansas is appended to the jurisdictional statement in the case of *Southwestern Bell Telephone Co.* v. *Lee*, No. 299, October Term, 1940.

Respectfully submitted,

(S.) BERNAL SEAMSTER,
JOHN MOHLER,
BLAKE DOWNIE,
EDW. B. DOWNIE,
Attorneys for Appellant.

(9180)

IN THE

SUPREME COURT OF THE UNITED STATES.

SOUTHWESTERN BELL TELEPHONE COMPANY, a Corporation, Appellant, v. S. B. HANNA, Appellee.	No. .....

APPELLANT'S BRIEF
IN OPPOSITION TO MOTION TO DISMISS AND IN SUPPORT OF THE JURISDICTION OF THIS COURT.

This is a companion case with **Southwestern Bell Telephone Company v. Lee** with which it was consolidated for the purpose of opinion and decision in the Supreme Court of Arkansas. The questions involved in the appeals of the two cases to this court are essentially identical. Accordingly, the appellant respectfully directs the court's attention to the brief in the Lee case in support of the jurisdiction of this court for an expression of appellant's views on that subject applying also to this case.

Respectfully submitted,

E. W. CLAUSEN,
BLAKE DOWNIE,
JOHN MOHLER,
EDW. B. DOWNIE,
Attorneys for Appellant.

Office - Supreme Court, U. S.
FILED
AUG 2 1940
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 300

SOUTHWESTERN BELL TELEPHONE COMPANY,
Appellant,

vs.

S. B. HANNA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

JOHN MAYES,
REX W. PERKINS,
G. T. SULLINS,
CHARLES D. ATKINSON,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 300

SOUTHWESTERN BELL TELEPHONE COMPANY,
Appellant,

vs.

S. B. HANNA.
Appellee.

OPPOSING STATEMENT BY APPELLEE AS TO BASIS OF JURISDICTION AND MOTION TO DISMISS THE APPEAL.

Pursuant to Rule 12, subdivision 3, of the General Rules of the Supreme Court of the United States, appellee files this, his statement of grounds making against the assertion of jurisdiction by the United States Supreme Court in the premises.

It appears from the record of the judgment and cause sought to be reviewed herein as well as by the statement as to the basis of jurisdiction filed by appellant herein, that no Federal question was involved or decided, inasmuch as said judgment was rendered by the trial court in the first instance, and affirmed by the Supreme Court of Arkansas, pursuant to the verdict of the jury, based solely upon the factual issue of discrimination, wherein was contained no

Federal question of any nature whatsoever; and therefore no jurisdiction exists in this Court, no matter how invoked, to review the said judgment.

That no treaty or statute of the United States was declared invalid; and no statute of any State was declared valid in the face of any attack thereon on the ground of its being repugnant to the Constitution, treaties or laws of the United States; and, therefore, under the provisions of Title 28, U. S. C. A., Section 344 (a), no jurisdiction for review of said judgment exists in this Court.

That there was not drawn into question the validity of any treaty or statute of the United States, nor of any statute of any State on the ground of its being repugnant to the Constitution treaties or laws of the United States; nor was there specially set up or claimed by either party hereto any title, right, privilege or immunity under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States; and, therefore, under the provisions of Title 28, U. S. C. A., Section 344 (b), no jurisdiction for a review of said judgment exists in this Court.

Appellee is not unmindful of the fact that by the simple assertion of the non-existence of a Federal question in this case, he has practically exhausted his persuasive powers in this respect. The case is now before this Court on appeal, and speaks for itself far more effectively than can counsel. However, to the end that the Court may be made more fully cognizant of appellee's exact position, he offers the following in support of his major premise—the absence of a Federal question.

This case was commenced under Section 14261 of Pope's Digest of the Statutes of Arkansas, which reads as follows:

> "Every telephone company doing business in this State and engaged in a general telephone business shall

supply all applicants for telephone connection and facilities, without discrimination or partiality, within ten days after written demand therefor; provided, such applicants comply or offer to comply with the reasonable regulations of the company, and no such company shall impose any condition or restriction upon any such applicant that are (is) not imposed impartially upon all persons or companies in like situations; nor shall such company discriminate against any individual or company engaged in lawful business by requiring as condition for furnishing such facilities that they shall not be used in the business of the applicant, or otherwise, under penalty of one hundred dollars and five dollars per day for each day from the expiration of such notice until said demand is complied with or suit is instituted for failure to comply with such demand, for such discrimination, after compliance or offer to comply with the reasonable regulations and time to furnish the same has elapsed, to be recovered by the applicant whose application is so neglected or refused. Any person denied such telephone facilities shall also have the right to proceed by mandamus or other proper remedy to enforce the furnishing of same, and the courts shall hear such applications either in vacation or term time and make such temporary orders relative to the furnishing of such facilities as the facts may justify, and may enforce compliance therewith until such orders are vacated by order of the court or judge at chambers, or such suit is finally determined."

Under the clear terms of this statute, appellee must have established two things before he would be entitled to recover the penalties provided; (1) that there had existed, as between himself and others in like situation with him, a discrimination against him practiced by appellant; (2) that upon his demand for service he had complied or offered to comply with the reasonable rules of appellant.

From their very nature, these questions were, and could be only questions of pure fact, the decision of which de-

volved upon, and were conclusively answered by, the jury. This then, is the whole case. The relevant statute quoted above, was never attacked by appellant as being unconstitutional under the Federal Constitution, and for this reason, it may not be said that its validity was sustained by the Arkansas Supreme Court, in the sense as used in 28 U. S. C., Sec. 344 (a) or (b), *supra*. Further, no title, right, privilege or immunity was ever set up by appellant, under the Constitution or laws of the United States, up to and including the final judgment of the Arkansas Supreme Court, in the sense as used in 28 U. S. C., Sec. 344 (b).

The only conclusion possible is that there simply is not any Federal question in this case. It follows that regardless of how impressively formal may be the assignments of error in this regard by appellant, this Court has no jurisdiction to review the judgment. *Zucht* v. *King*, 260 U. S. 174; *Quong Ham Wah Co.* v. *Commsn.*, 255 U. S. 445; *U. S. F. & G.* v. *Oklahoma*, 250 U. S. 111.

It is not entirely clear from appellant's assignment of error or its statement in support of jurisdiction, just what is the basis of its claim of Federal jurisdiction—whether it be because the statute, Section 14261 was held invalid, or because appellant's rule V-c was held unreasonable, or both. In any event, appellant's claim is ineffectual. As pointed out above the discrimination statute was never attacked, and in truth was never even "construed" by the Supreme Court of Arkansas, simply because no construction was necessary. If the Arkansas Court's alleged ruling on appellant's rule V-c be the gravamen of the latter's complaint herein, this, likewise avails appellant naught. Appellant admits (page 1, appellant's Statement in support of Jurisdiction) that the rule V-c is its own rule, and not that of the Arkansas Department of Public Utilities. Therefore, in holding the rule unreasonable (if it did such) the Arkansas court was not invalidating the order of any State legislative body, nor act-

ing in a legislative capacity, since only appellant had made this rule. Further, the Department of Public Utilities did not make the rule its own, but only ordered an impartial enforcement of it. This is the very thing that the jury in the trial court, and the Supreme Court of Arkansas found appellant had not done. Therefore, no repugnance exists between the positions taken by the Arkansas court and the Department of Public Utilities.

A further interesting observation relative to this rule V-c may be made at this point. Appellant has much to say concerning the absence of any notice and hearing afforded it as to the reasonableness of the rule, and hinges thereon its claim of property deprivation. The answer is simple. No notice and hearing was provided, for the reason that none was necessary; the rule was not being, and has never been, attacked by appellee. Indeed, appellee has always offered to comply with this very rule. And here in passing, it might be noted that appellant's cited "due process" cases are accordingly not pertinent in this case. Finally, it is exceedingly doubtful that the Arkansas court did in fact declare rule V-c unreasonable *per se*. And even if it did so, appellee submits that the court's language in that respect is purely dictum, and may therefore not be employed by appellant to support an alleged Federal question so as to confer jurisdiction upon this Court.

Let us see. After quoting the rule in full (140 S. W. 2d 133-134), which requires only that the instrument be located in a place not accessible for public use, the court continues (pp. 134-135): "It is her (appellee's) contention • • • that she offered to comply with the reasonable rules and regulations of the company, even including the requirement that the telephone be placed under a counter, in a showcase, or in a compartment. The dispute in this regard is that the telephone company insists now that it was not installed because she did not agree or promise to refuse permission

to use the telephone in a new location, though she did agree to conform with all reasonable rules and regulations of the company. No examination of the foregoing rule will disclose that she should act as a guard for the telephone company to prevent the use of the telephone, nor is there anything in this entire record * * * indicating * * * a grant of power * * * to the telephone company to exact a promise from her, in addition to the one to abide by the reasonable rules and regulations of the company."

Elsewhere in the opinion, the court finds, as it must have done, that the issue of appellee's offer to comply with the reasonable regulations (including rule V-c) of appellant had been settled in appellee's favor by the jury's finding, as likewise on the primary factual issue of discrimination. It appears therefore, that the court's opinion was based purely on confirmation of the factual question presented to it, and that its holding as to rule V-c was only dictum; and further, even if more than dictum, it is a holding only that the *application*, or unauthorized extension of the rule by appellant was bad, and not that the rule itself is invalid. It follows logically then, that no Federal question is presented or could be presented on this appeal, and that even if by some manner of legal legerdemain such a question could be conjured up, the decision thereof was not essential to the judgment of the Arkansas court.

Appellee cannot too strongly urge upon the sensibilities of this Court this one essential point: That this case was not instituted nor decided on the basis of any rule of service (rule V-c or otherwise), but purely on the theory of *discrimination*, a *factual* concept, which was decided and concluded by the jury. The decision of the Arkansas Supreme Court does not hold otherwise. Accordingly, no Federal question is present here.

But even if for purposes of argument, it be assumed that a Federal question did arise, still, that portion of the Arkan-

sas court's opinion relative to rule V-c is only dictum, and was not necessary to its opinion and decision because the reasonableness of the rule was never traversed. The legal rule in this respect is well settled. It is essential that the decision of the State court *of necessity* involve a determination of the Federal question. It must appear affirmatively that the court could not have decided as it did unless it had decided the Federal question, and that such decision was not in any sense obiter. *Brown* v. *Atwell*, 92 U. S. 327; *Vandalia R. Co.* v. *Indiana*, 207 U. S. 359; *Adams* v. *Russell*, 229 U. S. 353; *Whitney* v. *California*, 274 U. S. 357; *Lynch et al.* v. *New York, ex rel. Pierson*, 293 U. S. 52; *Honeyman* v. *Hanan*, 300 U. S. 14; *S. W. Bell Tel. Co.* v. *Oklahoma*, 303 U. S. 206.

Hand in hand with the foregoing rule relative to dictum, is the rule of equal authority, that if the decision of the State court rests upon non-Federal grounds adequate to support it, this Court will refuse jurisdiction, even though a Federal question be actually involved. *Lynch* v. *New York, ex rel. Pierson, supra; New York City et al.* v. *Central Sav. Bank*, 306 U. S. 661.

So here, even conceding appellant its vainly striven for Federal question (and bear in mind, appellee is nowhere recognizing this), it becomes apparent that the decision of the alleged Federal question was in no way essential to the opinion of the Arkansas court, and also that there existed an adequate non-Federal ground on which to base the court's opinion, i. e., the factual issue of discrimination. How much more tenuous and unreal, therefore, is the suggested jurisdiction of this Court, in view of the fact that there exists herein no Federal question at all.

Another defect: Appellant's supposed bases for the jurisdiction of this Court are shot through with vagueness and non-particularity. The burden of appellant's complaint throughout its assignments of error and statement in sup-

port of jurisdiction, when summed up, amounts to no more than a claim that the Arkansas court erred in not reversing the judgment of the trial court, because the scope and effect of the discrimination statute, section 14261, *supra*, deprived appellant of its property in violation both of due process and equal protection clauses. As hereinbefore observed, it is difficult to ascertain just what appellant is driving at, inasmuch as it skips from section 14261 to rule V-c, and back again, and finally winds up by asserting both. It is plain then, that the constitutional question raised is frivolous, unsubstantial, indefinite and fictitious, and thus presents no question for this Court's consideration. *Seaboard Air Line R. Co.* v. *Watson*, 287 U. S. 86.

Finally, sweeping aside the requirements that there be a Federal question; that it be substantial, that it must necessarily have been decided by the State court; and sweeping aside the requirements of 28 U. S. C. Sec. 344 (a) and (b), appellee submits that this question, whatever be its nature, this *thing* appellant relies upon, has been set up too late. To urge upon this Court a jurisdiction based upon a question raised for the first time in its petition for rehearing to the State Supreme Court, is but the last gasping effort of an unwilling litigant to avoid answering for its mistaken policies. If appellant conceived the existence of a Federal question in this case, the time to have asserted it was at the trial of this case in circuit court. Appellee brought his action under Section 14261. Rule V-c was not in his mind in connection with this suit save that he had offered to comply with it, as he must have done under the statute. Why, therefore, did not appellant complain then of the statute? Confronted with such an action, why did not appellant then assert its Federal question? Why? Because no Federal question existed; because no construction of this statute was contemplated or was necessary; because no Federal question has ever existed in this case. To come

now and invoke the jurisdiction of this Court, on the ground that there exists a Federal question, when appellant never thought of such a thing until its petition for rehearing in the Arkansas Supreme Court, is in itself, almost a confession of "no jurisdiction". *Consolidated Turnpike Co.* v. *Norfolk*, 228 U. S. 326; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 112; *St. Louis, etc. R. Co.* v. *Shepherd*, 240 U. S. 240.

Appellee would at this point beg the Court's indulgence for the length and formal unorthodoxy of this statement against jurisdiction, and motion to dismiss the appeal. But appellant's pleadings and papers herein are so involved and so adroitly worded that it is incumbent upon counsel for appellee to answer a number of appellant's statements and assertions, in order, not only that appellee's cause be well and truly advocated, but also that this Court may not be misled by suavity of language or subtlety of innuendo.

On page 2 of appellant's statement in support of jurisdiction, it is stated that the plaintiff (appellee here) demanded semi-public telephone service at the rate provided for the more restricted customer classification—the latter being the type of service to which rule V-c would apply. This statement is wholly and absolutely incorrect. Let the record speak in answer to this assertion of appellant (R. 2, 3, 4). The only type of service ever requested by appellee was that type variously denominated as "customer service", or "straight or regular business telephone service" at the lawful rate of $3.50 per month. Appellee has never requested that service be provided him at less than prescribed rates.

On page 3 of appellant's Statement, it is asserted that plaintiff's claim at the trial was that because other persons were receiving semi-public service at the lower customer service rate, he too was entitled to such service, and

that appellant's refusal to "violate the Utilities Act in his case" subjected appellant to the penalties of Section 14261. This assertion is likewise wholly and absolutely untrue. While it may well be that such a situation was a discrimination in fact against appellee, such was not relied upon by appellee nor ever advanced by him in support of his action. The whole theory of appellee's case was that he had been unlawfully discriminated against because appellant had failed and refused to furnish him with *any service whatsoever*, whereas others in like situation with him were given service. Never, at any time did appellee demand that appellant violate the Utilities Act in his favor by extending to him standard service at a less-than-legal rate.

It was upon this theory of appellee's case that the jury found discrimination and upon which the Supreme Court of Arkansas affirmed the judgment below. Appellant would have this Court believe that the case was affirmed because the Arkansas court held rule V-c unreasonable upon collateral attack. Appellee has hereinbefore demonstrated the transparency of this argument. Here was no collateral attack. The plain truth is that penalties were assessed against appellant, not because the rule was or was not unreasonable, but because appellant had been guilty of discrimination, wholly dehors the rule. The alleged collateral attack is non-existent, for the reason that no attack was ever made upon the rule at any stage of the case. The remarks of the Arkansas Supreme Court, though perhaps richly deserved by appellant, were no more than that tribunal's opinion about something which was not before it—in short, its language is dictum.

Throughout appellant's Statement, it makes its specious appeal to the sympathy of this Court. According to appellant, if it abides by Section 14261, in order to avoid penalties thereunder, it must perforce subject itself to liability for violation of the Public Utilities Act (Pope's Digest,

Sections 2121-2124); or, if it complies with the Public Utilities Act it thereby makes itself liable for penalties under Section 14261. The fallacy of appellant's argument is readily discernible. It has already received judicial condemnation, by the Arkansas Supreme Court, which held categorically that there is no repugnancy between Section 14261 and the Public Utilities Act. (*S. W. Bell Tel. Co.* v. *Matlock*, 195 Ark. 168.) Secondly, as a matter of logic, if, as appellant insists, rule V-c has been declared unreasonable, appellant is *ipso facto* relieved of the necessity of enforcing it, and could not, in the nature of things, be punished under the Public Utilities Act for failure to enforce a void rule. Thirdly, it must be remembered that violations of the Public Utilities Act constitute matter for adjustment as between the State and the offending utility, whereas violations of Section 14261 constitute matter for adjustment as between the individual wronged by the violation (discrimination) and the utility. That a discrimination might be practiced by a telephone company which would be unlawful under Section 14261, and the company yet be perfectly within the bounds of the rules set by the Public Utilities Act is a proposition so plain and simple as to be apparent to a six-year old. Thus, appellant's "anomalous and inequitable" proposition is revealed in its true light as no more than the product of its own devious but none the less spurious logic.

In point of fact, this ruse of appellant's being discovered and set at nought, its whole claim to this Court's jurisdiction falls to the ground like paw-paws after frost. For, under appellant's theory, Section 14261 was "construed" by the Arkansas Supreme Court so as to produce the result contended for by appellant above. If no such construction was in fact made (and it could not have been so made) then the appeal to this Court's jurisdiction of necessity fails.

Appellant cites and relies upon *S. W. Tel. & Tel.* v. *Danaher*, 238 U. S. 482. The company rule in that case was that service could be refused and no discount allowed for paying bills promptly, if the subscriber was in arrears on his telephone bill. The Supreme Court of Arkansas held this rule unreasonable. But in the cited case, the company was denied the right to prove or seek to prove non-compliance, on the part of the plaintiff, with this rule, which was certainly error. In the case at bar, no such element appears. Appellant was left free and unhindered to put all the proof at its command before the jury that appellee did not comply or offer to comply with rule V-c. The result, as determined by the jury was that appellee had offered to comply with this rule, and therefore no error can be predicated upon this basis, as there was in the *Danaher* case, *supra*. Furthermore, the emphasis placed by this Court upon the then statutory penalty of $100.00 per day leads to the permissible inference that one not inconsiderable element of this Court's disapproval lay in the severity of the penalty. The statute now in effect, Section 14261, provides for a penalty of $5.00 per day.

It should be noted further that this *Danaher* case, after having gone twice to the Arkansas Supreme Court, and once to this Court (*supra*), found its way once more to the Supreme Court of Arkansas. *Danaher* v. *S. W. Tel. & Tel. Co.*, 137 Ark. 324. There, pursuant to the mandate of this Court, the Arkansas court remanded to the circuit court for a new trial. Complaint was filed, alleging facts relied on to establish discrimination, under the predecessor of Section 14261, and alleging, also pursuant to the statute, compliance with defendant's reasonable regulations. Defendant's demurrer to the complaint was sustained and plaintiff appealed. The Arkansas Supreme Court said (p. 331): "Neither this court nor the Supreme Court of the United States has yet declared the statute unconstitu-

tional, upon the state of facts alleged in the complaint, the truth of which the demurrer admits." The court then reversed the judgment and remanded to the trial court with directions to overrule the demurrer.

So here, in the case at bar, appellee's complaint simply set up facts which he claimed constituted discrimination and alleging his offer of compliance with the reasonable rules of appellant company. Upon issues joined, and trial had, the jury found for appellee on these purely factual questions. In such a state of the record, how can it be seriously urged that a Federal question was presented or that such a question must have been decided by the Supreme Court of Arkansas in affirming the judgment?

Appellant would next, on page 10 of its Statement, have this Court believe that in any event, appellant was deprived of property without due process of law, since this case is governed by *S. W. Tel. & Tel.* v. *Sharp & White*, 118 Ark. 541, and that the Arkansas court did not follow this case. It has always been appellee's understanding that a court of last resort is the most competent judge of its own decisions, as to their relevancy and applicability to later cases. Perhaps appellant is introducing a new theory into appellate practice by suggesting that courts of last resort should not be permitted to construe their own opinions and decisions, but should in a given case yield to the persuasions of counsel.

Again, this case does not present a question of permitting appellant to mend its ways (a confession of past guilt), as contended by it on page 11 of its Statement. The question in this case is one of liability for penalties for an unlawful discrimination knowingly and systematically pursued.

Appellant next asserts, on pages 11-12 of its Statement that appellee was offered the service requested at the legal rate therefor, but that he refused it, and that the Arkansas

Supreme Court's decision in effect holds that appellee need not have complied with appellant's reasonable regulations. Further, that penalties were assessed against appellant before the Arkansas Supreme Court found that other customers of appellant were violating their contracts with appellant; and that if this be true, there was no evidence that appellant knew of such violations. Appellee's answer to these erroneous propositions of appellant's is simple and is sustained by the record. Despite appellant's claim as to the kind of service offered appellee, the fact remains that he was denied legal service of any kind at any rate, even though he had offered to comply with appellant's rules. As for appellant's interpretation of the Arkansas court's opinion on the question of compliance, this decision does not and could not hold as appellant says. The whole basis of appellee's case is that he must have complied or offered to comply with the appellant's reasonable regulations. The jury found that he had so offered to comply. This question is therefore rendered moot.

Again, while it may be true that the evidence incidently disclosed that other customers of appellant were violating their contracts, this fact signifies nothing. Penalties were assessed against appellant because it had failed and refused to furnish appellee with any service at all, while others like him were served. Herein lay the discrimination. Appellant further claims that it did not know of such violations by its other subscribers, and that there was no evidence, other than that each witness who was a subscriber was shown to have been a subscriber of several years' standing. In such a situation, with appellant rendering them continuous service, maintaining their lines, and collecting their rentals, appellant's assertion in this respect is a *reductio ad absurdum* of legal and logical reasoning, and avails it nothing.

Summary and Conclusion.

To the end that this Court may be left with the clearest understanding of appellee's position, he concludes his necessarily lengthy Statement against Jurisdiction, and Motion to Dismiss, with a summary of his principal grounds therefor:

1. No Federal question of any kind was or is present in this case, since it involves only questions of fact already concluded by the jury at the trial of the case, and affirmed by the Supreme Court of Arkansas on that basis; therefore, no jurisdiction exists in this Court, no matter how invoked.

2. None of the requisites of either 28 U. S. C. 344 (a) or (b) is present in this case, therefore, no jurisdiction exists in this Court on review.

3. Even if a Federal question were presented in this case, the decision of the Supreme Court of Arkansas herein did not, of necessity, require a determination of such Federal question, and accordingly, under the general and well-settled rule, no jurisdiction for review exists in this Court.

4. Further, since the language of the Supreme Court of Arkansas relied upon by appellant herein as setting up the alleged Federal question was and is only *obiter dictum*, and not essential to the decision of this case by said Court, it follows, under the accepted rule, that no jurisdiction for review exists in this Court.

5. Inasmuch as there was in this case an adequate non-Federal ground upon which the decision of the Supreme Court of Arkansas could have been, and was based, it follows that, under the general rule, no jurisdiction for review exists in this Court.

6. Finally, that even though appellant be conceded its Federal question, which appellee does not, since it affirma-

tively appears from the record and judgment herein that the alleged Federal question was not raised by appellant until after the final judgment of the Supreme Court of Arkansas, it follows, under the general rule, that appellant has not asserted the existence of a Federal question and consequent jurisdiction of this Court, at the proper time, and therefore no jurisdiction for review exists in this Court.

WHEREFORE, the foregoing premises considered, appellee respectfully moves that the appeal herein be dismissed by this Honorable Court.

Dated July 15, 1940.

(S.) JOHN MAYES,
REX W. PERKINS,
G. T. SULLINS,
CHARLES D. ATKINSON,
Attorneys for Appellee.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

SOUTHWESTERN BELL TELEPHONE COMPANY, a Corporation, Appellant, v. CARRIE C. LEE, Appellee.	}	No. 299.
and		
SOUTHWESTERN BELL TELEPHONE COMPANY, a Corporation, Appellant, v. S. B. HANNA, Appellee.	}	No. 300.

APPELLANT'S MOTION FOR REHEARING AND RECONSIDERATION OF ORDER DISMISSING APPEALS.

Now comes the appellant, Southwestern Bell Telephone Company (leave hereunto having first been obtained), and moves the Court to set aside its order of October 14, 1940, dismissing the appeals in these causes, and further moves the Court to rehear and reconsider the question of jurisdiction herein, for the reason that the Court erred in conclud-

ing that these causes are wanting in the timely presentation of federal questions, as will be made to appear in the accompanying suggestions in support hereof.

And the appellant further moves the Court to stay and withhold the mandates herein until such time as this motion may be disposed of, and thereafter as the circumstances may warrant.

E. W. Clausen,
Blake Downie,
John Mohler,
Edw. B. Downie,
Attorneys for Appellant.

SUGGESTIONS IN SUPPORT OF MOTION.

The appellant can understand the Court's *per curiam* order of dismissal in these causes as meaning only that the federal questions were raised too late. The authorities pointed to as the basis for the order all declare that the raising of the federal questions on a petition for rehearing in the state court of last resort comes too late. The Court's use of the local citations within the cases directs attention exclusively to this principle; and this principle is the only one pronounced in any of the cited cases which the appellant can conceive as applicable to these causes.

As demonstrated in its brief in support of this Court's jurisdiction, the appellant has been well aware of the rule that ordinarily federal questions may not be first raised on a petition for rehearing. This law is well established, and is well supported by the authorities which this Court has employed, Godchaux v. Estopinal, 251 U. S. 179; Rooker v. Fidelity Trust Co., 261 U. S. 114, 117; Herndon v. Georgia, 295 U. S. 441, 443. But there is a well defined, and quite necessary, exception which is observed, in fact, on page 444 of the Herndon case—the page immediately following the one cited locally by this Court for a statement of the general rule. This Court said on page 444:

> "• • • There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it. Saunders v. Shaw, 244 U. S. 317, 320, 61 L. ed. 1163, 1165, 37 S. Ct. 638; Ohio ex rel. Bryant v. Akron Metropolitan Park Dist., 281 U. S. 74, 79, 74 L. ed. 710, 715, 50 S. Ct. 228, 66 A. L. R. 1460; Missouri ex rel. Missouri Ins. Co. v. Gehner, 281 U. S. 313, 320, 74 L. ed. 870, 875, 50 S. Ct. 326; Brinkerhoff-Faris Trust & Sav. Co. v. Hill,

281 U. S. 673, 677, 678, 74 L. ed. 1107, 1111, 1112, 50 S. Ct. 451; American Surety Co. v. Baldwin, 287 U. S. 156, 164, 77 L. ed. 231, 236, 53 S. Ct. 98, 86 A. L. R. 298; Great Northern R. Co. v. Sunburst Oil & Ref. Co., 287 U. S. 358, 367, 77 L. ed. 360, 367, 53 S. Ct. 145, 85 A. L. R. 254."

Until the time of this Court's order of dismissal, the appellant had been confident that its cases clearly fell within the exception of uncontemplated actions by the state court of last resort. Owing, perhaps, to a little too much confidence on this score, the appellant relegated its rather brief treatment of this subject to the later pages of its brief respecting jurisdiction, where its discussion may be found beginning on page 25. The appellant there made no effort to repeat the facts earlier displayed in that brief, and to relate them to the subject of the seasonable tender of the federal issues. The appellant had assumed, perhaps mistakenly, that the acts of the Supreme Court of Arkansas which were described in the preceding pages of the brief would still be borne in mind and applied to the subject of the timely raising of the federal questions. Suspecting now that its assumption may have been unwarranted, the appellant will here undertake its demonstration that these cases are truly embraced in the exception to the rule.

The federal questions in these cases, while first raised on petition for rehearing, were nevertheless raised at the first opportunity. There were no federal questions in the cases until the surprising and unprecedented decision of the Supreme Court of Arkansas. While a fuller account may be found in the appellant's brief in support of jurisdiction, this, briefly, is what happened:

One of the appellant's tariff rules which had been duly filed with the Arkansas utilities' regulatory commission, as the Arkansas regulatory act required, and which had been

affirmatively approved and ordered enforced by the commission after hearing, was interposed by the appellant as a defense to the plaintiffs' actions under an Arkansas statute for penalties for refusal to provide telephone service. The penalty statute required an offer to comply with the reasonable rules and regulations of the telephone company. The plaintiffs categorically declined to comply with this particular rule (Tr. II, 5; Appellant's Brief on Jurisdiction, 22), and asserted that they were not obliged to do so in order to maintain their actions since other telephone customers were not complying with the rule.

In the trial court the plaintiffs never claimed that the rule was unreasonable, and accordingly they never offered any evidence on the subject of its reasonableness. Naturally, of course, with the reasonableness of the rule so conceded, the appellant, when its turn came, offered no evidence to fortify the concession. Furthermore, the appellant was conducting its cases in the belief that the reasonableness of the rule so filed with the regulatory commission could not be questioned in such a collateral proceeding, but could be attacked only in the manner prescribed by the statute in a direct proceeding to review the orders of the commission. The cases from all jurisdictions had so held without any exceptions known to the appellant—and Arkansas had neither then, nor yet, ruled upon the question.

In argument in the Supreme Court of Arkansas, the plaintiffs again renounced any attack on the reasonableness of the rule, and they have acknowledged this position with welcomed frankness in their motion to dismiss, filed in this court, where they say on page 4:

> "• • • the rule was not being, and has never been, attacked by appellee."

But in spite of the fact that the issue of reasonableness

of the rule was not tendered by the parties, and in spite of the fact that no evidence was offered to prove the rule unreasonable, the Supreme Court of Arkansas seized upon the absent issue in the following words from its opinion:

> "Ordinarily we would feel ourselves bound by such limitations as the plaintiffs themselves may have felt impelled to recognize in the decision of any rights they may have asserted in any matter wherein those rights were purely personal or individual.
>
> "In this matter, however, there are more than individual rights involved. The telephone company is a public service utility, having a monopoly of the service it renders in Fayetteville, where these suits originated, and whatever rules it may announce must be considered not as an all-controlling force, or to possess the nature of a statutory enactment, but as regulatory, merely, of the business of the corporation, and that such regulation must be considered as coupled inseparably, always, with the public interests. Therefore, if rules are not reasonable they may not be regarded as enforcible or as affecting the rights of those who deal with the telephone company."

And the Supreme Court of Arkansas thereupon, without any issue, without any evidence, and in that collateral fashion, declared the rule to be unreasonable, and for that reason affirmed the judgments in favor of the plaintiffs, who were obliged by the statute to comply only with the reasonable rules and not with the unreasonable.

Now the appellant apprehends that scarcely any action of an appellate court could be held to be more unanticipated than this performance of the Arkansas court. The element of undeniable surprise casts these cases squarely within the exception to the rule relative to tardy presentation observed in the quotation from the Herndon case and in the other cases cited in that quotation.

The action of the Arkansas court in deciding the ques-

tion of reasonableness of the rule without notice or hearing on the issue, and without any evidence, is indeed one of the very actions which would deprive the appellant of due process. Obviously, the question of this denial of due process could not be raised before the action of the Court took place—and it was immediately raised at the first opportunity thereafter, on the petition for rehearing.

This Court has repeatedly held that the denial of rights given by the Fourteenth Amendment need not be by legislation (Great Northern R. Co. v. Sunburst Oil Co., 287 U. S. 358; Home Tel. & Tel. Co. v. Los Angeles, 227 U. S. 278; Abbot v. Tacoma Bank of Commerce, 175 U. S. 409; and the cases hereafter cited). Following that principle, this Court has repeatedly held that, in the judicial procedure, an absence of notice or hearing, or an absence of evidence, on a decided issue, produces an unconstitutional want of due process (American Land Co. v. Zeiss, 219 U. S. 47; Twining v. New Jersey, 211 U. S. 78; Carlson v. Washington, 234 U. S. 103, 223 U. S. 573; Cedar Rapids Gas Light Co. v. Cedar Rapids, 227 U. S. 601; Fiske v. Kansas, 274 U. S. 380).

It is true, of course, that in most of these cases (the Great Northern and Saunders cases being notable exceptions) the federal question of want of due process was raised before a petition for rehearing in the state courts of last resort; but that was because the denial of due process by decision without hearing or evidence occurred in the trial courts rather than in the appellate courts. Such was not the case here; the rule was not adjudged unreasonable until it was so adjudged for the first time by the Supreme Court of Arkansas on appeal.

While the authorities seem to be ample, even if this question of jurisdiction in these cases were to be considered as one of first impression, it would seem that by analogy the rule must inevitably be here established that since a

decision in the *nisi prius* courts may not constitutionally be reached without hearing or without evidence, neither may such a result come to pass in the appellate courts. If the action is taken in the trial forum, and the federal question is there promptly raised after the action is taken, this Court has consistently assumed jurisdiction to review. The implication of the orders of dismissal in these cases would seem to be that this Court will not likewise review such a decision when it is originally pronounced in the court of last resort, rather than in the trial court, although question of constitutionality was thereafter raised at the first possible opportunity.

Certainly this Court does not purpose to prescribe rules affecting its jurisdiction which would permit it to review an asserted taking of a litigant's property without due process of law by a decision of a trial court, but which would prevent such a review if the same oppressive decision originated in the appellate court. Such a hiatus in the protection of constitutional rights cannot be permitted, as this Court itself declared in Saunders v. Shaw, 244 U. S. 317, when it said:

> "The question remains whether the writ of error can be maintained. The record discloses the facts but does not disclose the claim of right under the Fourteenth Amendment until the assignment of errors filed the day before the chief justice of the state granted this writ. Of course, ordinarily that would not be enough. **But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here.** The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling

> or to take other precautions in advance. The denial of rights given by the Fourteenth Amendment need not be by legislation. Home Teleph. & Teleg. Co. v. Los Angeles, 227 U. S. 278, 57 L. ed. 510, 33 Sup. Ct. Rep. 312. It appears that shortly after the Supreme Court had declined to entertain the petition for rehearing the plaintiff in error brought the claim of constitutional right to the attention of the chief justice of the state by his assignment of errors. We do not see what more he could have done."

The appellant is not unmindful that the claim has been made that the confused opinion of the Supreme Court of Arkansas lays the decision on some ground other than the unreasonableness of the appellant's rule. This interpretation of the opinion, however, simply cannot be maintained. The decision was clearly based on the unreasonableness of the rule, as the appellant believes it incontrovertibly demonstrated in its brief in support of jurisdiction at page 19 et seq.

In the event, however, that some other ground of decision might conceivably be apprehended, the same principles discussed above would still apply, although in a slightly different connection. If there is, in the decision, a basis different from the unreasonableness of the rule, that basis necessarily involves an interpretation of the penalty statute which the appellant says renders it repugnant to the Federal Constitution. All other grounds of decision, beside unreasonableness, inevitably involve an interpretation of the penalty statute to the effect that the penalty statute will be violated, under the circumstances of these cases, by a compliance with the regulatory statute. This subject is discussed at some length in the appellant's brief on jurisdiction at page 14 et seq. and page 25.

Since this federal question under the Constitution could not have arisen until the penalty statute was so interpreted as to make obedience to one statute a violation of another,

the appellant cannot perceive how that federal question could have been raised in advance of the unanticipated interpretation which for the first time effected the unconstitutionality of the statute. Until the Supreme Court of Arkansas interpreted the statute in such a way as to render it unconstitutional, the appellant knows of no process by which it could have ascribed unconstitutionality to it.

Indeed it did argue that if the statute were not construed as appellant had construed it, the unconstitutional result would follow. The appellant knows of nothing more that it could have done. In its argument to persuade the Arkansas Court to adopt the appellant's interpretation of the penalty statute, it was pointed out that any other interpretation would end in unconstitutionality. This argument was used in connection with the familiar rule that if multiple interpretations are open, the one that accords with constitutionality ought to be adopted. Until the Arkansas Supreme Court's decision, the federal implications could not have been raised in the record, but could only have been raised, as the appellant did raise them, in the argument for an interpretation of the statute which would not conflict with the Constitution. Until the Arkansas Supreme Court so interpreted the statute as to attribute unconstitutionality to it, the statute was entirely valid; and the appellant could not have been expected to look upon it otherwise. The statute became unconstitutional only at the moment when the Arkansas court's decision, containing the unconstitutional interpretation, was handed down. And promptly thereafter the appellant raised the federal question in its petition for rehearing. Under these circumstances, to paraphrase this Court in Saunders v. Shaw, "We do not see what more he (the appellant) could have done."

For the reasons here advanced, the appellant urges that the orders of dismissal herein be set aside, that the mat-

ter of this Court's jurisdiction be reconsidered, that probable jurisdiction be noted, and that these causes be set for hearing upon both the merits and the question of jurisdiction.

Respectfully submitted,

E. W. CLAUSEN,
BLAKE DOWNIE,
JOHN MOHLER,
EDW. B. DOWNIE,
Attorneys for Appellant.

No. 299. SOUTHWESTERN BELL TELEPHONE CO. *v.* LEE; and

No. 300. SAME *v.* HANNA. Appeals from the Supreme Court of Arkansas. October 14, 1940. *Per Curiam:* The motions to dismiss are granted and the appeals are dismissed for want of a properly presented federal question. *Godchaux* v. *Estopinal*, 251 U. S. 179; *Rooker* v. *Fidelity Trust Co.*, 261 U. S. 114, 117; *Herndon* v. *Georgia*, 295 U. S. 441, 443. *Messrs. Edward B. Downie* and *E. W. Clausen* for appellant. *Suzanne Chalfant Lighton* for

appellee in No. 299. *Mr. Charles D. Atkinson* for appellee in No. 300. Reported below: 200 Ark. 318; 140 S. W. 2d 132.